Nos. 03-334, 03-343

Supreme Court, U.S.
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In The

Supreme Court of the United States

FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR PETITIONERS

THOMAS B. WILNER
Counsel of Record
NEIL H. KOSLOWE
KRISTINE A. HUSKEY
JARED A. GOLDSTEIN
HEATHER LAMBERG KAFELE

SHEARMAN & STERLING LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: 202-508-8000
Facsimile: 202-508-8100
Attorneys for Petitioners

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COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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QUESTION PRESENTED

Whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.

LIST OF PARTIES AND CORPORATIONS

The following Kuwaiti nationals who are imprisoned at Guantanamo Bay Naval Base appeared below as plaintiffs: Fawzi Khalid Abdullah Fahad Al Odah, Omar Rajab Amin, Nasser Nijer Naser Al Mutairi, Khalid Abdullah Mishal Al Mutairi, Abdullah Kamal Abdullah Kamal Al Kandari, Abdulaziz Sayer Owain Al Shammari, Abdullah Saleh Ali Al Ajmi, Mohammed Funaitel Al Dihani, Fayiz Mohammed Ahmed Al Kandari, Fwad Mahmoud Al Rabiah, Adil Zamil Abdull Mohssin Al Zamil, and Saad Madai Saad Al Azmi. The following additional Kuwaiti nationals, who are family members of the Kuwaiti nationals listed above, also appeared below as plaintiffs: Khaled A.F. Al Odah, father of plaintiff Fawzi Khalid Abdullah Fahad Al Odah; Mohammad R.M.R. Ameen, brother of plaintiff Omar Rajab Amin; Nayef N.N.B.J. Al Mutairi, brother of plaintiff Nasser Nijer Naser Al Mutairi; Meshal A.M.T.H. Al Mutairi, brother of plaintiff Khalid Abdullah Mishal Al Mutairi; Mansour K.A. Kamel, brother of plaintiff Abdullah Kamal Abdullah Kamal Al Kandari; Sayer O.Z. Al Shammari, father of plaintiff Abdulaziz Sayer Owain Al Shammari; Mesfer Saleh Ali Al Ajmi, brother of Abdullah Saleh Ali Al Ajmi; Mubarak F.S.M. Al Daihani, brother of plaintiff Mohammed Funaitel Al Dihani; Mohammad A.J.M.H. Al Kandari, father of plaintiff Fayiz Mohammed Ahmed Al Kandari; Monzer M.H.A. Al Rabieah, brother of plaintiff Fwad Mahmoud Al Rabiah; Walid Z.A. Al Zamel, brother of plaintiff Adil Zamil Abdull Mohssin Al Zamil; and Hamad Madai Saad, brother of plaintiff Saad Madai Saad Al-Azmi (collectively the "Family Members").

LIST OF PARTIES AND CORPORATIONS – Continued

The following appeared below as defendants: the United States of America; George W. Bush, President of the United States; Donald H. Rumsfeld, Secretary of Defense; General Richard B. Myers, Chairman of the Joint Chiefs of Staff; Brigadier General Rick Baccus, Commander of Joint Task Force-160, and Colonel Terry Carrico, Commandant of Camp X-Ray/Camp Delta.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 321 F.3d 1134 (D.C. Cir. 2003) and is reprinted in the Appendix to Petition for Writ of Certiorari ("Pet. App.") 1. The orders denying a petition for rehearing and rehearing *en banc* are reprinted at Pet. App. 72, 73. The opinion of the district court is reported at 215 F. Supp. 2d 55 (D.D.C. 2002) and is reprinted at Pet. App. 33.

JURISDICTION

The petition for rehearing and rehearing *en banc* was denied on June 2, 2003. A petition for a writ of certiorari was timely filed on September 2, 2003, and the Court granted the petition on November 10, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Amendment V; 5 U.S.C. § 702; 28 U.S.C. §§ 1331, 2241-2243; Military Order No. 1, 66 Fed. Reg. 57,833; and U.S. Army Regulation 190-8, Washington, D.C. (October 1, 1997).

STATEMENT OF THE CASE

1. On September 11, 2001, terrorists attacked the United States, highjacking commercial airliners and flying them into the World Trade Center in New York City and the Pentagon, killing thousands of innocent people. Joint Appendix ("J.A.") 21-22. In the wake of the attack, apparently executed by the terrorist organization known as al Qaida, President Bush launched a military campaign against al Qaida, headquartered in Afghanistan, and the Taliban regime that supported al Qaida. *Id.* at 22.

On November 13, 2001, the President issued a Military Order entitled "Detention, Treatment, and Trial of Certain Non-Citizens in The War Against Terrorism" (the "Military Order").[1] Section 1 of the Military Order recites

[1] 66 Fed. Reg. 57,833 (Nov. 16, 2001).

"Findings" about the terrorist attacks, including a finding that "it is necessary for individuals subject to this order . . . to be detained." Those subject to the Military Order are defined in Section 2(a) to be "any individual who is not a United States citizen with respect to whom [the President] determine[s] from time to time in writing" that "there is reason to believe that such individual, at the relevant times . . . is or was a member of the organization known as al Qaida [or] has engaged in, aided or abetted, or conspired to commit, acts of international terrorism. . . ." The Military Order states that "any individual subject to this order [shall be] detained at an appropriate location designated by the Secretary of Defense outside or within the United States. . . ."[2]

2. Petitioners are 12 citizens of the State of Kuwait who were in Pakistan and Afghanistan serving as charitable volunteers to provide humanitarian aid to the people of those countries. J.A. 24. To the best knowledge of their families, none of the petitioners is or ever has been a member or supporter of al Qaida, the Taliban, or any terrorist organization, or has ever engaged in or supported any terrorist or hostile act against the United States. *Id.* at 25. However, sometime after September 11, 2001, the petitioners were seized against their will in Pakistan and Afghanistan by local villagers seeking bounties and other financial rewards from the United States. *Id.* Subsequently, they were taken into custody by the United States. *Id.*

The President made no determination that there is reason to believe any of the petitioners is or was a member of al Qaida or has engaged in any act of terrorism and is therefore subject to detention under the Military Order. *Id.* Nevertheless, beginning on January 11, 2002, the petitioners were forcibly transported by the United States to the Guantanamo Bay Naval Base ("Guantanamo"), and

[2] Military Order §§ 2(b), 3.

they have been imprisoned there by the United States ever since. *Id.* at 26.

Respondents are not holding the petitioners as prisoners of war under the Geneva Conventions, which would confer upon them a recognized status and defined rights, including release at the end of hostilities. *Id.* at 31. Instead, respondents have placed the petitioners in a legal "black hole" for more than *two years*, during which none has been charged with any offense, permitted to meet with members of his family or counsel, or been allowed access to any impartial tribunal. *Id.* at 29.[3]

3. In 1903, in withdrawing its occupying forces after the Spanish-American War, the United States entered into a lease with the newly formed Republic of Cuba for the territory that now forms Guantanamo. The lease provides:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over [Guantanamo], on the other hand the Republic of Cuba consents that during the period of occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas with the right to acquire . . . for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain. . . .[4]

The lease continues in perpetuity unless the United States agrees to terminate it.[5]

[3] The Secretary of Defense and other Defense Department officials have publicly acknowledged that an undetermined number of detainees at Guantanamo are '"victims of circumstance'" who are "innocent" and "shouldn't have been brought" to Guantanamo. Pet. App. 94.

[4] Agreement between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, art. III, T.S. 418.

[5] Treaty Defining Relations with Cuba, May 29, 1934, U.S.-Cuba, art. III, 48 Stat. 1682, 1683, T.S. 866.

4. Petitioners filed their complaint in the district court on May 1, 2002, and amended it on July 8, 2002, seeking modest but essential relief. J.A. 14. They neither challenge their initial capture nor seek immediate release from confinement. Rather, they ask only that they be accorded fundamental rights during their confinement: that they be informed of the charges, if any, against them; that they be allowed to meet with their families and counsel; and that they be afforded access to an impartial tribunal to review whether any basis exists for their continued imprisonment. J.A. 34. They ask for those rights subject to any restrictions that might reasonably be necessary to protect national security. *Id.* They allege that the denial of these rights violates the Constitution, international law, and treaties of the United States, and is arbitrary, capricious, and contrary to federal law and regulations. *Id.* The petitioners invoked the district court's jurisdiction under 28 U.S.C. § 1331 (federal question), among other statutory bases, and further asserted that the district court was empowered to grant them relief under 28 U.S.C. § 2243 (habeas corpus). J.A. 19-20.

The district court dismissed the amended complaint for lack of jurisdiction. Pet. App. 33. Relying upon *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the court held that it had no jurisdiction to entertain petitions for writs of habeas corpus filed by aliens detained outside the sovereign territory of the United States. *Id.* at 67. The court made no mention of section 1331, the primary basis of jurisdiction alleged in the complaint.

5. On March 11, 2003, the court of appeals affirmed the dismissal, largely on the basis of this Court's decision in *Eisentrager*. Although the court of appeals assumed, for purposes of its decision, that petitioners are not "enemy aliens," as were the *Eisentrager* petitioners, and have not engaged in hostilities against the United States, as had the *Eisentrager* petitioners, it nevertheless read *Eisentrager* to mean that "constitutional rights . . . are not held by aliens outside the sovereign territory of the United States, regardless of whether they are enemy aliens." Pet. App. 13. As a result, the court of appeals concluded that

"no court in this country has jurisdiction to grant habeas relief" to the detainees. *Id.* at 14. Further, the court of appeals held that, even if the petitioners' claims "do not sound in habeas," the "courts are not open to them." *Id.* at 20-21. The court of appeals rejected petitioners' argument that, even if *Eisentrager* supported these propositions, they should not be extended to foreign nationals held at Guantanamo because the United States exercises complete control and jurisdiction there. *Id.* at 16-19. The court of appeals held that Cuba's technical "sovereignty" over Guantanamo, rather than United States' exclusive jurisdiction and control, was determinative. *Id.*

SUMMARY OF ARGUMENT

Petitioners have been jailed at Guantanamo for over two years. They were taken there without any written determination, as required by the President's Military Order, that there was "reason to believe" that they were connected with terrorism. They specifically allege in their complaint that they were not. Yet, for over two years petitioners have been denied access to any impartial tribunal to hear their claims and determine if a basis exists for their detentions. If the government is correct that U.S. courts lack jurisdiction, they may be held this way forever, without charge or trial or a hearing of any kind. The courts could never review their detentions, no matter how long they are held, no matter how arbitrary their detentions might be, and no matter how they are treated.

No decision of this Court or any other authorizes that result. It is contrary to our most fundamental traditions.

It is also contrary to the statutes enacted by Congress defining the jurisdiction of the federal courts. Petitioners allege that the government's decisions and actions denying them access to their families and counsel and to any impartial tribunal violate the Constitution and the laws and treaties of the United States, and are arbitrary and capricious within the strictures of the Administrative Procedure Act (the "APA"). Jurisdiction to hear these

claims is explicitly conferred by 28 U.S.C. § 1331 (jurisdiction to hear "all civil actions arising under the Constitution, laws, or treaties of the United States") and 28 U.S.C. § 2241(c)(3) (jurisdiction to issue writs of habeas corpus for prisoners "in custody in violation of the Constitution or laws or treaties of the United States").

This Court has long and repeatedly held that broad jurisdictional grants like these give the courts created by Congress authority to review executive actions, particularly when the actions deprive individuals of their liberty. Restrictions of that judicial authority are not to be implied in the absence of a clear and unambiguous congressional statement restricting or repealing the courts' jurisdiction. No enactment by Congress even arguably restricts or repeals the courts' jurisdiction in the circumstances of the present case or licenses the executive to act in Guantanamo without accountability to the Constitution, laws, or treaties of the United States.

There is a reason why this Court has always insisted on the most explicit kind of statement before it will find that Congress has withdrawn judicial jurisdiction to test executive actions injurious to personal freedom against the basic commands of law. Congress is not presumed to intend to sweep all of our traditions into the fire unless it says so directly. And those traditions attest with absolute clarity to the essential role of independent judicial judgment in ensuring that the freedoms which this Nation was created to preserve and protect are not lost through unrestrained zeal on the part of executive officers to do everything they think efficient to avert perceived threats to the nation's safety.

Our nation was the first to be deliberately founded on principles of individual liberty, fundamental fairness, and justice under law. Those principles were embodied in our Constitution and safeguarded through its structure of separated powers. An independent judiciary with authority to check the excesses of executive action that are particularly likely to occur in times of stress and danger was considered essential to ensure that freedom and the

rule of law would not be disregarded or sold short whenever, in the view of the executive, they were inconvenient impediments to the executive's policies for addressing the exigencies of the moment.

The need for judicial oversight was always considered greatest to protect against arbitrary detention. As Alexander Hamilton explained: "[T]he practice of arbitrary imprisonment [has] been, in all ages, the favorite and most formidable instrument of tyranny. . . . And as a remedy for this fatal evil [Blackstone] is everywhere peculiarly emphatical in his encomiums on the habeas-corpus act, in which one place he calls the 'BULWARK of the British Constitution.'"[6] Significantly, when Hamilton wrote those words, before our Constitution was adopted, it was already well established under the common law that jurisdiction to issue writs of habeas corpus was not restricted to citizens or confined within the borders; it extended to non-enemy aliens and persons held in custody in areas outside the sovereignty but subject to the control of the Crown.

Any retreat from this principle—and, in particular, any rule disjoining the territorial reach of judicial authority from the territorial reach of plenary executive power—would encourage manipulation by executive officials anxious to avoid having to defend their conduct against charges that it is unwarranted in law or baseless in fact. To erect a categorical geographic boundary beyond which the executive has total power to act but the courts have no jurisdiction to examine that action is to allow the executive itself to decide whether its actions can or cannot be called to account under the law. By the simple expedient of electing to hold its prisoners offshore, the executive could divest the courts of jurisdiction and insulate its actions from review.

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[6] THE FEDERALIST NO. 84 (Alexander Hamilton) (quoting 4 William Blackstone, COMMENTARIES 438).

That was the purpose here. A recently released paper makes clear that the government selected Guantanamo as its prison site largely to avoid court review of its actions.[7]

But petitioners are not challenging the ministerial actions of the jailers at Guantanamo. Rather, they challenge the administrative decisions that were made to deny them access to their families and to counsel and, most importantly, to any impartial tribunal to review whether a basis exists for their detentions. Those decisions were made in the United States, and apparently at the highest levels of government, and the orders to follow them were issued from the United States. To allow government officials acting within the United States to insulate the decisions they make here from court review simply by holding their prisoners outside the borders would deprive the judiciary of its essential function as a check on the power of the executive. Authorizing them to do so violates the very essence of the separation of powers that the Constitution's framers implemented to guard against tyranny.

With no support from Congress, the government bases its claim that the courts lack jurisdiction on this Court's decision in *Johnson v. Eisentrager*. It argues in effect that *Eisentrager* provides it with absolute immunity from judicial oversight whenever it elects to hold foreign nationals in custody outside U.S. sovereign territory. But that argument goes far beyond *Eisentrager*.

Eisentrager stands for the sensible proposition that enemy aliens, who had been tried and convicted overseas by a duly constituted military tribunal established under law, could not obtain review of their convictions in the U.S. civil courts. The Court did not hold in that case that aliens who had *not* been tried or convicted, or even charged,

[7] *See* Col. Daniel F. McCallum, *Why GTMO*? (hereinafter "McCallum, *Why GTMO*?") at 6, available at the website of the National War College, http://www.ndu.edu/nwc/writing/AY03/5603/5603G.pdf (visited Jan. 9, 2004).

could be detained indefinitely without even a hearing—just because they were kept outside our borders. As Justice Jackson, who authored the *Eisentrager* opinion, later pointed out: "Under the best tradition of Anglo-American law, courts will not deny hearing to an unconvicted prisoner just because he is an alien whose keep, in legal theory, is just outside our gates."[8]

Eisentrager also did not deal with the detention of friendly aliens—that is, citizens of allied nations—as to whom no presumption of enemy status could be made. *Eisentrager* actually supports petitioners' claim that, as citizens of an allied nation, they are entitled to a hearing at least to determine whether they are in fact enemies of the United States.

Finally, Guantanamo is not like China, where the petitioners in *Eisentrager* were tried and convicted, or Germany, where they were imprisoned. Guantanamo, "for all practical purposes, is American territory."[9] Although Cuba does retain "ultimate" sovereignty over Guantanamo, and therefore would ultimately regain sovereignty if the United States ever decides to terminate its perpetual lease rights there, there is no doubt that the United States exercises full current sovereignty over and within Guantanamo. It has complete jurisdiction and control there. There is no possibility of a conflict with the laws of any other nation, or of an appeal to any other nation's courts, because only United States laws apply there, and only the U.S. courts have jurisdiction. The idea that the United States can warehouse prisoners in Guantanamo outside the law and without review by U.S. courts has no support in the *Eisentrager* decision.

[8] *Shaughnessy v. United States*, 345 U.S. 209, 219 (1953) (Jackson, J., dissenting).

[9] The History of Guantanamo Bay: An Online Edition (1964), at 7-8 available at the official Navy website www.nsgtmo.navy.mil/history.htm (hereinafter "U.S. Navy Website").

The Court in *Eisentrager* also emphasized that its decision was fully in accord with international law. The government's treatment of the Kuwaiti detainees clearly is not. No principle is more settled in international law today than that an individual may not be deprived of liberty by government authority without access to an impartial tribunal established by law. The idea that this or any nation can go around the world rounding up aliens and imprisoning them outside the rule of law and without court review is simply anathema to the law of civilized nations.

The Geneva Conventions mandate that a "competent tribunal" review the status of any detainee as to whom there is any doubt. Numerous international treaties require a prompt impartial review of any decision by a government to deprive a person of liberty. This Court has long recognized that, to the extent possible, United States law should be interpreted in accordance with settled international principles. As much force as that doctrine has when the United States is acting with respect to its own citizens, it has particular importance in this case where the people being detained are citizens of allied nations who would otherwise be entitled to the protection of those principles were they not held in exclusive U.S. custody.

The government appears to believe that federal court jurisdiction would threaten our national security. But our Constitution, drafted with a great war fresh in mind, was not written to exempt executive action from court oversight in times of crisis. As Chief Judge Cranch stated almost two hundred years ago:

> [W]hen the public mind is agitated, when wars, and rumors of wars, plots, conspiracies and treasons excite or alarm, it is the duty of a court to be peculiarly watchful. . . . The Constitution was made for times of commotion. In the calm of peace and prosperity, there is seldom great injustice. Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude.[10]

The courts should certainly pay considerable deference to the executive in times of crisis, and they have the wisdom and the experience to do so. But the government here is not asking for deference. It contends that the courts do not even have the authority to defer; that they lack jurisdiction even to examine the government's actions. The courts' role may be limited in times of crisis, but they must have a role to play. They must have the authority to defer. They must be able to ask of the executive why the restrictions it has imposed are necessary, and some reason must be given to which deference is due.

Judicial review does not threaten national security; rather, it ensures that measures taken in response to the nation's need for security remain consistent with its democratic principles of fundamental fairness and liberty. The President of the Israel High Court of Justice has emphasized the critical role that judges play in fighting terrorism:

> While terrorism poses difficult questions for every country, it poses especially challenging questions for democratic countries, because not every effective means is a legal means. . . . We, the judges in modern democracies, are responsible for protecting democracies both from terrorism and from the means that the state wants to use to fight terrorism. . . .
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> The power of society to stand up against its enemies is based on its recognition that it is fighting for values that deserve protection. The rule of law is one of these values.[11]

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[10] *United States v. Bollman*, 24 F. Cas. 1189, 1192 (C.C.D.C. 1807) (Cranch, C.J., dissenting).

[11] Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 148-51 (2002).

Accepting jurisdiction will not open the floodgates to litigation. It is not necessary that an Article III court itself review the basis for each individual detention. What is necessary is that some legal process apply and that the federal courts have jurisdiction to ensure that one does. Just as the Court in *Eisentrager* had jurisdiction at least to determine if the petitioners there were convicted by a properly constituted military tribunal, so here must the courts have jurisdiction to determine if individuals are detained in accordance with some valid legal process.

The government must have authority to detain people who pose a danger to the nation. But there must be some legal process—some impartial review—to distinguish those who are dangerous from those who have been swept up without basis. The government's own regulations, incorporating the requirements of the Geneva Conventions, establish such a process. Applied in each of our recent conflicts, that process has been ignored at Guantanamo. But such a process is particularly important in the new war on terrorism, precisely because the enemy is so amorphous and the danger of mistake so great.

Depriving individuals of their liberty without a process can be justified only for so long as it takes to put a process in place. Nothing more strikingly demonstrates the need for judicial oversight than that, without it, after more than two years, in a place far from the battlefield, the government still has not put a process in place.

The executive may conduct that process—and, indeed, the government's regulations call for it to do so—but the judiciary must stand watch. Barring the judiciary from playing that role violates the basic separation of powers designed by our framers to secure liberty.

ARGUMENT

This case stirs fundamental questions about the judicial function in a constitutional democracy dedicated to the rule of law. The government has argued, and the court of appeals agreed, that the judiciary lacks power to consider petitioners' claims of unlawful detention because petitioners are aliens held by the government outside the

territorial sovereignty of the United States. That conclusion, if accepted, would deny the courts their historic role as a check on executive power and would cede to the executive unreviewable authority to confine petitioners indefinitely. Such a result would raise grave constitutional questions. Those questions need not be addressed, however, because the jurisdiction of the federal courts over petitioners' case is plainly conferred by statutes enacted by Congress, and no action of Congress or this Court calls that jurisdiction into question. A consideration of the relevant statutes in light of canons of construction that this Court has always observed clearly resolves the jurisdictional issue now before the Court.

I. CONGRESS HAS EXPRESSLY GRANTED THE DISTRICT COURT JURISDICTION

Two statutory grants of jurisdiction expressly give the district court authority to review the legality of petitioners' detentions: 28 U.S.C. § 1331, which establishes jurisdiction to hear cases involving substantial questions of federal law, and 28 U.S.C. § 2241, which establishes jurisdiction to consider allegations of detention in violation of the Constitution, laws, or treaties of the United States.

A. The District Court Had Jurisdiction Under 28 U.S.C. § 1331

In 28 U.S.C. § 1331, Congress granted the federal district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." As this Court has explained, section 1331 confers jurisdiction to hear cases in which "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law."[12] Nothing in the language or history of section 1331 suggests that the

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[12] *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 28 (1983).

federal courts lack jurisdiction to consider federal questions raised by aliens detained abroad.[13]

Petitioners' complaint plainly falls within that broad grant of jurisdiction because it alleges violations of the Constitution, federal regulations, the Military Order, and treaties of the United States, thus raising substantial federal questions. Specifically, petitioners allege that the government is violating fundamental principles of due process by imprisoning them indefinitely without charge, access to counsel, or access to any impartial process for reviewing their detentions.[14] The complaint also alleges that the government's detention of petitioners violates government regulations that require the government to provide petitioners access to a "competent tribunal" to assess their status,[15] and further alleges violation of the Military Order, under which non-citizens may be detained as part of the war on terrorism only if the President (or someone delegated that task by him) makes a determination in writing that there is reason to believe each of the

[13] The court of appeals held that federal courts lack jurisdiction because foreigners abroad have no cognizable legal rights. Pet. App. 14. Even if that conclusion could be supported, however, it would not affect the *jurisdiction* of the district court to hear petitioners' claims. It is "firmly established" that "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). This is not a case in which jurisdiction may be found lacking on the ground that petitioners' claims are "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 (1974). This Court has never ruled that foreigners subjected to indeterminate executive detention without process—inside or outside the territorial United States—have no cognizable rights.

[14] *See Gerstein v. Pugh*, 420 U.S. 103, 117-18 (1975); *Jackson v. Indiana*, 406 U.S. 715, 737-39 (1972); *Addington v. Texas*, 441 U.S. 418, 425-27 (1979); *Zavydas v. Davis*, 533 U.S. 678, 690 (2001).

[15] *See Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, U.S. Army Regulation 190-8, Chapter 1-5, para. A., Pet. App. 80-81.

detainees is associated with al Qaida or supported acts of terrorism.[16] Finally, the complaint alleges that petitioners' detention violates customary international law and several treaties of the United States.[17]

In many respects, this is a routine APA case in which the federal courts have jurisdiction under section 1331. Plaintiffs allege that the defendants, all of whom are federal officials, have violated a wide range of statutory, regulatory, and constitutional provisions, precisely the kind of APA case that the federal courts handle every day. To be sure, the merits of these claims are hardly routine, but the lower courts here never reached the merits. Instead, they simply ruled that the federal courts are closed to all of these APA claims, despite the clear grant of subject matter jurisdiction over federal claims in section 1331.

B. The District Court Had Jurisdiction Under 28 U.S.C. § 2241

In 28 U.S.C. § 2241, Congress granted the federal district courts authority to consider the legality of detention of any person imprisoned "under or by color of the authority of the United States" or who is alleged to be held "in custody in violation of the Constitution or laws or treaties of the United States." Petitioners are persons imprisoned by the United States, and they allege that their continuing subjection to custody without process violates the Constitution, laws, and treaties of the United States. Petitioners' claims clearly come within the terms of the habeas statute, and the court of appeals was "not at liberty to except from [habeas corpus jurisdiction] any cases not plainly excepted by law."[18]

[16] Military Order, Section 2.

[17] *See infra* Section IV.

[18] *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 102 (1869).

In construing the reach of habeas jurisdiction, "[i]t must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired."[19] Allegations of arbitrary detention, like those asserted by petitioners, occupy the heartland of habeas corpus jurisdiction. As Alexander Hamilton explained in Federalist No. 84, "the practice of arbitrary imprisonments, [has] been, in all ages, the favorite and most formidable instruments of tyranny," and habeas corpus is the "remedy for this fatal evil."[20] The grant of habeas jurisdiction must be construed broadly in order to protect the fundamental role played by the writ of habeas corpus in securing liberty.[21] This Court has never failed to accord that jurisdiction a scope appropriate to the writ's "grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."[22]

The Court has held that, in the absence of a congressional suspension of the writ, habeas remains available "at the absolute minimum . . . as it existed in 1789."[23] This Court has recognized that habeas jurisdiction historically has been "available to non-enemy aliens as well as to

[19] *Bowen v. Johnston*, 306 U.S. 19, 26 (1939).

[20] *See also INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest."); *Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., joined by Blackmun and Rehnquist, JJ., concurring); *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) (Marshall, C.J.).

[21] *See, e.g., Lonchar v. Thomas*, 517 U.S. 314, 324 (1996); *O'Neal v. McAninch*, 513 U.S. 432, 442 (1995); *Harris v. Nelson*, 394 U.S. 286, 291 (1969); *Ex parte Siebold*, 100 U.S. 371, 377 (1879); *Yerger*, 75 U.S. (8 Wall.) at 102 (declaring that the fundamental importance of habeas corpus jurisdiction "forbid[s] any construction giving to doubtful words the effect of withholding or abridging this jurisdiction").

[22] *Jones v. Cunningham*, 371 U.S. 236, 243 (1963).

[23] *St. Cyr*, 533 U.S. at 301 (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)).

citizens."[24] Habeas jurisdiction was uniformly exercised by the English courts prior to 1789 to review claims by non-enemy aliens and persons detained abroad.[25]

Because it was solidly established at the time the Constitution was adopted that habeas jurisdiction authorized review of executive detention of non-enemy aliens, regardless where they were detained, denial of jurisdiction would be appropriate only if the government could show that Congress has repealed that jurisdiction. This the government has not and cannot show.

II. THE STATUTORY GRANTS OF JURISDICTION MUST BE CONSTRUED IN LIGHT OF LONG-HELD CANONS OF CONSTRUCTION

The denial of jurisdiction over petitioners' claims conflicts with three long-established canons of statutory construction, all of which support the district court's authority to hear petitioners' claims: (1) the strong presumption that jurisdiction should be construed to allow judicial review of executive action; (2) the canon against construing statutes in a manner that raises substantial constitutional questions; and (3) the canon against construing statutes in a manner inconsistent with the law of nations.

[24] *Id.*

[25] At least as early as 1669, the English central courts were issuing the writ into dominions beyond the realm, *see, e.g., R. v. Salmon*, 84 Eng. Rep. 282 (K.B. 1669) (the Isle of Jersey); Sir Matthew Hale, THE HISTORY OF THE COMMON LAW OF ENGLAND 120 (1755). The local courts also issued the writ in areas where the Crown had sufficient authority to enforce its command without respect to whether it claimed technical sovereignty over the region. *See* Nasser Hussain, THE JURISPRUDENCE OF EMERGENCY: COLONIALISM AND THE RULE OF LAW 10 (2003); Henry Herbert Dodwell, 4 THE CAMBRIDGE HISTORY OF THE BRITISH EMPIRE 592-95 (1929). For a detailed discussion of the English history and practice, see the briefs *amicus curiae* of American and British Legal Historians and the Commonwealth Lawyers Association.

A. The Denial of Jurisdiction Conflicts with the Strong Presumption that Executive Action Is Subject to Judicial Review

In holding that federal courts lack authority to review petitioners' claims, the court of appeals ignored the "strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear and unambiguous statement of congressional intent to repeal habeas jurisdiction."[26] The presumption of reviewability applies with special force in a case like the present in which petitioners assert that the executive has denied fundamental principles of liberty and due process because, as this Court recognized long ago, judicial review protects the "[t]he very essence of civil liberty [which] certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[27] Although the government claims to possess unlimited and unreviewable authority to detain and interrogate petitioners, judicial review ensures that "[n]o man in this country is so high that he is above the law."[28] The presumption that executive action is subject to judicial review also has clear application because petitioners have invoked the judicial review provision of the APA, which codified the presumption of judicial reviewability of executive action.

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[26] *St. Cyr*, 533 U.S. at 298; *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) ("[A] survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 498 (1991); *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974); *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 28-29 (1835).

[27] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

[28] *United States v. Lee*, 106 U.S. 196, 220 (1882); *see also Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 671 (1986) (stating that the denial of judicial review "would in effect be [a] blank check[] drawn to the credit of some administrative officer or board").

1. The Presumption of Judicial Review Embodies a Longstanding Commitment to the Rule of Law

The presumption that executive action is subject to judicial review embodies our legal tradition's longstanding commitment to the rule of law.[29] Almost 800 years ago, the Magna Carta established that no one may be imprisoned except in accordance with processes administered by an independent tribunal.[30] In the centuries thereafter, English law developed the writ of habeas corpus to ensure that persons imprisoned by the executive have recourse to the courts to review the legality of their detention. Building on this foundation, the United States Constitution protects the rule of law through the establishment of an independent judiciary with authority to check the excesses of executive action. As this Court declared: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[31]

In asking this Court to rule that it may detain prisoners indefinitely without any recourse to judicial review, the

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[29] *See* Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455, 469 (2003) ("Someone must be guarding the guardians, or else ultimately there is nothing but the rule of men."); Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1313 (2001) (contrasting the rule of law with the rule of men, which "connotes unrestrained and potentially arbitrary personal rule by an unconstrained and perhaps unpredictable ruler"); Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 9 (1997) (defining as one of the essential elements of the rule of law that "[c]ourts should be available to enforce the rule and should employ impartial procedures.").

[30] MAGNA CARTA, cl. 39 (1215) ("No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.").

[31] *Marbury*, 5 U.S. (1 Cranch) at 163; *see also Romer v. Evans*, 517 U.S. 620, 633 (1996).

government asks this Court to ignore the basis upon which the presumption of judicial review was established. This Court's commitment to the rule of law, however, as embodied by the availability of judicial review, has never faltered. That commitment has long ensured that "[a]ll officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."[32] This Court has long held that the judiciary cannot shirk its duty regardless whether the executive's purposes appear benign,[33] regardless whether the challenged government actions were undertaken to protect national security,[34] and regardless whether the actions were undertaken in times of war or peace.[35]

The government cannot meet the "heavy burden of overcoming the strong presumption" in favor of judicial review.[36] It is the government that bears the burden because "[j]udicial review of such administrative action is the rule, and nonreviewability an exception which must be

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[32] *Lee*, 106 U.S. at 220.

[33] *See Olmstead v. United States*, 277 U.S. 438, 479 (1925) ("Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent ... The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.").

[34] *See New York Times Co. v. United States*, 403 U.S. 713 (1971) (rejecting the government's argument that concerns of national security justified restraint on the publication of the Pentagon Papers); *Parisi v. Davidson*, 405 U.S. 34, 49 (1972) ("One overriding function of habeas corpus is to enable the civilian authority to keep the military within bounds."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring) ("No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role.").

[35] *See Ex parte Milligan*, 71 U.S. 2, 120-21 (1866) ("The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.").

[36] *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975).

demonstrated."[37] In order to establish that judicial review is unavailable, the government must provide "persuasive reason to believe that such was the purpose of Congress."[38] The government has pointed to no authority, however, to suggest that Congress intended to foreclose judicial review of petitioners' claims.

2. APA Section 702 Codifies the Presumption of Judicial Review of Executive Action

The APA, invoked by petitioners to establish their right to judicial review, embodies "the strong presumption that Congress intends judicial review of administrative action."[39] In enacting the APA, Congress made clear that the right to judicial review extends to nonresident aliens like petitioners. APA Section 702 establishes that judicial review is available to any "person suffering legal wrong because of agency action."[40] The federal courts have uniformly held that nonresident aliens are entitled to judicial review under the APA: "A person may be just as 'affected or aggrieved' by agency action if he is a nonresident and absent from the country as he would be if he were a resident and present."[41] That conclusion is confirmed by

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[37] *Barlow v. Collins*, 397 U.S. 159, 166 (1970).

[38] *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 424 (1995); *see also Bowen*, 476 U.S. at 671; *Yerger*, 75 U.S. (8 Wall.) at 102.

[39] *Bowen*, 476 U.S. at 670; *see also Lincoln v. Vigil*, 508 U.S. 182, 190 (1993) ("[W]e have read the APA as embodying a basic presumption of judicial review."); *Abbott Labs.*, 387 U.S. at 140; *Califano v. Sanders*, 430 U.S. 99, 104 (1977) (the APA "undoubtedly evinces Congress' intention and understanding that judicial review should be widely available to challenge the actions of federal administrative officials.").

[40] 5 U.S.C. § 702. The APA defines "person" broadly as "an individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. § 551(2).

[41] *Estrada v. Ahrens*, 296 F.2d 690, 695 (5th Cir. 1961); *see also Constructores Civiles de CentroAmerica, S.A. v. Hannah*, 459 F.2d 1183, 1190 (D.C. Cir. 1972); *cf. Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 578 (1908) ("Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights.").

the legislative history of the APA. When Congress amended the APA to create the Privacy Act, it employed the narrower term "individual" rather than "person," defining the former as "a citizen of the United States or an alien lawfully admitted for permanent residence."[42] By its use of the term "individual," defined to exclude nonresident aliens, Congress demonstrated its understanding that the right to judicial review available to "persons" under the APA extends to nonresident aliens.[43]

Petitioners' invocation of judicial review under the APA is further supported by the APA exceptions to judicial review for military action "exercised in the field in time of war," and military action in "occupied territory."[44] Those exceptions demonstrate that Congress did not intend to exempt from judicial review all actions undertaken by the armed forces outside the United States. Instead, Congress created exceptions for military action applicable in specific and narrowly drawn geographic areas—"in the field in time of war" and in "occupied territory." That Congress intended the exemption for military actions "in the field in time of war" and in "occupied territory" to apply narrowly is shown by the contrast with the broad exemption from

[42] 5 U.S.C. § 552a(2).

[43] *See, e.g., Raven v. Panama Canal Co.*, 583 F.2d 169, 170-71 (5th Cir. 1978); *Florida Med. Ass'n, Inc. v. Dep't of Health, Ed. & Welfare*, 479 F.Supp. 1291, 1307 (M.D. Fla. 1979) ("In choosing the word 'individual' as the object of the Privacy Act's protections, Congress demonstrated its awareness and preference for the narrower scope of that term, rather than the broader scope of the term 'person' to which the FOIA applies.").

[44] 5 U.S.C. § 701(b)(1)(H). Petitioners are not challenging any action taken in "occupied territory" or on the field of battle; Guantanamo is thousands of miles from the battlefields of Afghanistan. Moreover, the decisions petitioners are challenging—the decision denying them access to their families and to counsel and to any impartial tribunal—were all made within the United States. The APA also excepts from judicial review decisions of "military commissions." 5 U.S.C. § 701(b)(1)(F). That exception is consistent with this Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), discussed in Section III *infra*.

the requirements of notice-and-comment rulemaking for all "military or foreign affairs function[s]." By broadly exempting *all* military functions from rulemaking, while shielding from judicial review only military actions "in the field" and in "occupied territory," Congress expressed its understanding that extraterritorial military actions in other locations would be subject to judicial review. The exceptions therefore reinforce the presumption of judicial review.[45]

B. The Denial of Jurisdiction Conflicts with the Principle that Federal Statutes Should Be Construed to Avoid Raising Serious Constitutional Problems

This Court has long been guided by the canon of construction that, when "a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."[46]

[45] This Court held in *Gerstein v. Pugh*, 420 U.S. 103 (1975), that habeas is not the exclusive means for challenging the method by which detention has been imposed. *Gerstein* sustained the use of a declaratory judgment action brought by state detainees alleging that their detention without a pretrial hearing violated due process. This Court held that "the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy" because "respondents did not ask for release from state custody" but instead "asked only that the state authorities be ordered to give them a probable cause determination." *Id.* at 107 n.6. Petitioners likewise are not challenging the fact of their confinement and do not seek release. J.A. 19. Instead, as in *Gerstein*, they ask for access to some impartial tribunal to review whether there is *any* cause for their detention. Accordingly, under *Gerstein*, a petition for habeas corpus is not the sole means for petitioners to bring their claims. *See also Haines v. Kerner*, 404 U.S. 519 (1972); *Wilwording v. Swenson*, 404 U.S. 249 (1971).

[46] *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909); *see also Harris v. United States*, 536 U.S. 545, 555 (2001); *St. Cyr*, 533 U.S. at 299-300; *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trade Council*, 485 U.S. 568, 575 (1988).

Sustaining the government's position that there is a mechanical bar to federal court jurisdiction based on territorial sovereignty would raise constitutional questions of the greatest moment. It would give the executive unrestrained authority to operate an offshore prison outside the law, an institution without precedent in United States history. It would grant executive branch officials, without any authorization from Congress, the power to divest the courts created by Congress of jurisdiction to review executive actions simply by choosing to locate their prisoners offshore. It would grant U.S. government officials the freedom outside our sovereign territory to treat citizens of allied nations without regard to our "traditional notions of fair play and substantial justice."[47] And it would give executive officials the unfettered authority both to imprison foreign nationals and to serve as "the sole judges" of the legality of those detentions.[48] The canon of constitutional avoidance requires this Court to construe the jurisdictional statutes to avoid these grave constitutional problems.

C. The Denial of Jurisdiction Conflicts with the Principle that Federal Law Should Be Construed Consistently with International Law

This Court has long recognized that U.S. law "ought never to be construed to violate the law of nations if any other possible construction remains."[49] As discussed more

[47] *Asahi Metal Indus. Co. v. Super. Ct. of California*, 480 U.S. 102, 113 (1987).

[48] *United States v. U.S. Dist. Ct. for Eastern Dist. of Mich.*, 407 U.S. 297, 299-301 (1972); *see also Korematsu v. United States*, 323 U.S. 214, 234 (1944) (Murphy, J., dissenting) ("[T]he military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled."); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807) (determining that there was insufficient evidence to find that petitioners were waging war against the United States).

[49] *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *see also* THE FEDERALIST No. 63 (Alexander Hamilton) ("An

(Continued on following page)

fully in Section IV *infra*, barring the courts from exercising jurisdiction—and thereby denying petitioners any impartial review of their detentions—violates the most fundamental and settled principles of substantive international law. Even more than when the United States is acting with respect to its own citizens, the canon that calls for construing U.S. laws consistently with international law has vital importance in this case where the people being detained are citizens of allied nations who would otherwise be entitled to the protections of international law were they not held in the exclusive custody of the United States.

III. THERE IS NO BAR TO JURISDICTION

No enactment by Congress even arguably repeals or restricts the courts' jurisdiction in the circumstances of the present case or licenses the executive to act in Guantanamo without accountability to the Constitution, laws, or treaties of the United States. With no support from Congress, the court of appeals relied almost exclusively on the prior decision of this Court in *Johnson v. Eisentrager* for its conclusion that the federal courts lack jurisdiction.[50] But *Eisentrager* does not foreclose jurisdiction.

A. *Eisentrager* Does Not Control This Case

In *Eisentrager,* this Court held that 21 German civilians who were captured in China and charged there

attention to the judgment of other nations is important to every government for two reasons: . . . it is desirable, on various accounts, that it should appear to other nations as the offspring of a wise and honorable policy; the second is, that in doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed.").

[50] *See generally Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring) ("When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers. . . . When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.").

with war crimes, tried by duly-constituted military commissions, convicted of the charges, sentenced and, after review, imprisoned in a military prison in Landsberg, Germany, did not have a "right" to post-conviction review by writ of habeas corpus. The court of appeals in the present case held that, under *Eisentrager*, no federal court has *jurisdiction* to consider the claims of petitioners or any other aliens imprisoned outside the sovereign territory of the United States because our "courts are not open to them." Pet. App. 21. *Eisentrager* stands for no such proposition.

First, one cannot fairly read the *Eisentrager* opinion without acknowledging that the single most important fact underlying the Court's decision was the petitioners' status as adjudicated nonresident "enemy" aliens, a fact the Court mentioned more than 20 times. It was largely because "these prisoners were actual enemies, active in the hostile service of an enemy power," with respect to whom "[t]here is no fiction about their enmity," that the Court concluded they had no right to the sort of post-conviction habeas relief they sought. 339 U.S. at 778. The Court in *Eisentrager* did not adjudicate—nor is there any reason to suppose it intended to pass upon—the rights of nonresident aliens who are nationals of countries friendly to the United States and who have never been charged, let alone convicted by a court or military tribunal. Indeed, throughout its painstaking review of the treatment given by the courts to suits brought by citizens and aliens, the Court did not once refer to the situation of nonresident aliens who are nationals of countries friendly to the United States. *See* 339 U.S. at 768-78.[51] It is likely this is

[51] *Eisentrager* recognized that even enemy aliens, if resident in the United States, are entitled to a hearing to determine if they are in fact enemies, because one cannot be certain of their allegiance. *See* 339 U.S. at 778. Certainly, citizens of a friendly nation, such as petitioners, should be entitled to as much.

because it was obvious to the Court at the time *Eisentrager* was decided, as it is today, that nonresident individuals and corporations from countries friendly to the United States bring suit in the courts of the United States every day.

Second, as the petitioners in No. 03-334 have demonstrated, the aliens in *Eisentrager* were in fact afforded a full panoply of due process rights and never contended otherwise. The *Eisentrager* Court did not consider, much less pass upon, the right of a nonresident enemy alien to habeas corpus review of indefinite executive detention ordered without any form of process, in disregard of the most fundamental conceptions of the rule of law. *A fortiori*, the *Eisentrager* Court did not consider, much less pass upon, the right of nonresident nationals of a country friendly to the United States, such as petitioners, to habeas corpus review of detention in which fundamental due process rights are denied.[52]

Third, the *Eisentrager* petitioners' principal claim, according to the Court, was that they had "a right not to be tried at all for an offense against our armed forces." 339 U.S. at 782. The Court found no such right to exist under the Constitution. Its ultimate holding was crystal clear: "We hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States."

[52] Justice Jackson, the author of the *Eisentrager* opinion, recognized elsewhere that even the most notorious of our enemies are entitled to due process of law: "We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well. We must summon such detachment and intellectual integrity to our task that this trial will commend itself to posterity as fulfilling humanity's aspirations to do justice." Opening Statement of Robert Jackson, Chief United States Prosecutor, Nuremberg Tribunal, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (delivered Nov. 14, 1945).

Id. at 785. Petitioners here make no such claim of immunity from military trial.

Fourth, the *Eisentrager* petitioners were tried in China and imprisoned in Germany, both foreign countries over whose territory the United States lacked exclusive control or jurisdiction.[53] In contrast, the petitioners here are imprisoned in Guantanamo, over which the United States exercises complete control and jurisdiction. Unlike in *Eisentrager*, there is no possibility here that the exercise of U.S. court jurisdiction will conflict with the laws of any foreign country or the jurisdiction of any foreign court.[54]

In sum, *Eisentrager* holds that (i) enemy aliens who were (ii) granted fundamental due process in trials by duly-constituted military commissions in China, (iii) convicted of war crimes, (iv) sentenced after appeal, (v)

[53] China obviously is a foreign country over which the United States lacked control or jurisdiction at the time of the *Eisentrager* petitioners' trial. The Federal Republic of Germany was established on September 21, 1949, on which date the Military Government of the United States zone in occupied Germany was terminated. STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 92D CONG., DOCUMENTS ON GERMANY: 1944-1970, *Statement by the Department of State on the Establishment of the Federal Republic of Germany and the Entry into Force of the Occupation Statute,* at 166 (Comm. Print 1971). Thereafter, all prisoners in the Landsberg Prison, which was in the former United States zone in occupied Germany, came under the joint control of the Allied High Commission, consisting of members from the United States, Great Britain, and France. STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 92D CONG., DOCUMENTS ON GERMANY: 1944-1970, *Basic Principles for Merger of the Three Western German Zones of Occupation and Creation of an Allied High Commission, Signed at Washington, April 8, 1949,* at 150 (Comm. Print 1971). Thus, from before November 14, 1949, when this Court granted the writ of *certiorari* in *Eisentrager*, through June 5, 1950, when *Eisentrager* was decided, the *Eisentrager* petitioners were incarcerated in territory that was neither occupied by nor under the control of the United States, and the petitioners were under the joint control of the three members of the Allied High Commission. 339 U.S. at 786.

[54] *See* Section III.C, *infra*.

imprisoned in Germany, and (vi) who claimed that they had a constitutional right not to be tried by the military, were not entitled to post conviction habeas corpus relief. The court of appeals in the present case erred in concluding that *Eisentrager* resolves the very different question of whether petitioners, who are (i) nationals of a country friendly to the United States, (ii) denied fundamental due process for more than two years, (iii) neither convicted of any crime nor even charged with any wrongdoing, (iv) presumed by the courts below to be innocent, (v) imprisoned in Guantanamo, which is under the complete control and jurisdiction of the United States, and (vi) who do not claim they are immune from trial by the military, can have access to the U.S. courts to assert denial of fundamental rights.

B. *Eisentrager* Is Not a "Jurisdictional" Decision in the Sense of Holding that the Courts Lacked Power or Authority to Consider Petitioners' Claims

Beyond ignoring the controlling distinctions between *Eisentrager* and the present case, the court of appeals also erred in concluding that *Eisentrager* deprived the district court of jurisdiction—in the sense of *power* and *authority* —to consider petitioners' claims. The court of appeals read *Eisentrager* to extirpate the power and authority of U.S. courts to entertain all suits by all aliens in the custody of the U.S. military overseas, regardless of their nature and regardless of whether they sound in habeas or other heads of jurisdiction. Pet. App. 20. It broadly proclaimed that "the courts are not open" to such aliens. *Id.* But as demonstrated below, *Eisentrager* stands for no such proposition.

1. *Eisentrager* Was Decided Under 28 U.S.C. § 2243, Not 28 U.S.C. § 2241

This Court held in *Eisentrager* that the petitioners in that case had no "right" to habeas relief within the meaning of 28 U.S.C. § 2243, under which the writ shall be granted "'unless it appears from the application' that the applicants are not entitled to it." 339 U.S. at 767. This

holding, going to the substance of the *Eisentrager* petitioners' claims, was *not* a holding that the courts lacked jurisdiction—in the sense of *power* or *authority*—to decide those claims. Had the Court decided that the district court lacked jurisdiction, it would have decided the case under § 2241, which grants habeas jurisdiction, rather than under § 2243, which establishes the standards for issuing the writ.

The district court in *Eisentrager* decided the case on narrow, jurisdictional grounds. It noted at the outset of its opinion that "[t]he habeas corpus process is authorized to the District Court through the provisions of sections 451 and 452 of the Judicial Code [now codified at 28 U.S.C. § 2241] which provide . . . [that] the district courts within their respective jurisdictions shall have power to grant writs of habeas corpus. . . ." J.A. 141. The district court then cited *Ahrens v. Clark*, 335 U.S. 188 (1948), in which it said "the Supreme Court specifically passed upon the *power* of the district courts to issue writs of habeas corpus in cases in which the petitioners are not physically within the jurisdiction of the court." *Id.* (emphasis added). The district court read *Ahrens* to hold that the phrase "within their respective jurisdictions" in 28 U.S.C. § 2241 limited the power of district courts to consider petitions for the writ of habeas corpus to those filed by persons "confined or restrained within the territorial jurisdictions of the courts." *Id.* Because the *Eisentrager* petitioners were in Germany, the district court concluded that it must "bow[ ]" to *Ahrens* and dismiss their petition for lack of jurisdiction under § 2241. *Id.*

The court of appeals in *Eisentrager* similarly viewed the issue before it to be whether the district court had the power and authority, under 28 U.S.C. § 2241, to entertain the petition for a writ of habeas corpus. *Eisentrager v. Forrestal*, 174 F.2d 961, 962 (D.C. Cir. 1949). The court first concluded that the petitioners had a "right" to habeas review, and then reasoned that they could not be deprived of this right "by an omission in a federal jurisdictional statute." *Id.* at 965. To do so, thought the court of appeals,

would subject 28 U.S.C. § 2241 to invalidity "as constituting a suspension of the writ in violation of [the Suspension Clause]." *Id.* at 967. Therefore, the court of appeals construed 28 U.S.C. § 2241 to grant power and authority to a district court "which has territorial jurisdiction over the officials who have directive power over the immediate jailer" to entertain a petition for the writ of habeas corpus by "a person deprived of his liberty by the act of an official of the United States outside the territorial jurisdiction of any District Court of the United States." *Id.*

This Court, however, did not approach the principal issue in terms of whether the district court had power and authority under 28 U.S.C. § 2241 to entertain the petition.[55] On the contrary, it observed that "[t]he Court of Appeals assumed, *and we do likewise*, that, while prisoners are in immediate physical custody of an officer or officers not parties to the proceeding, respondents named in the petition have lawful authority to effect their release." 339 U.S. at 766-67 (emphasis added). This Court

[55] To be sure, the Court in *Eisentrager* spoke of the "ultimate question" being "one of jurisdiction of civil courts of the United States *vis-à-vis* military authorities in dealing with enemy aliens overseas." 339 U.S. at 937. There are numerous other references to "jurisdiction" and "territorial jurisdiction" throughout the *Eisentrager* opinion—some speaking of the "jurisdiction" of the military tribunals that had convicted the *Eisentrager* petitioners as though it were the reciprocal of the "jurisdiction" of the district court, *see* 339 U.S. at 765, 780, 785-88, a usage that confirms that *Eisentrager* was concerned with the petitioners' entitlement to relief rather than with the power of the habeas courts to adjudicate that right, *see, e.g., Johnson v. Zerbst*, 304 U.S. 458, 465-69 (1938). But despite these varying and ambiguous uses of the term "jurisdiction," it seems evident from the Court's explicit consideration of the merits of the petitioners' claims, *see* 339 U.S. at 782-90, that *Eisentrager* did not hold that the district court lacked "jurisdiction" to entertain the petition as "the term 'jurisdiction' is used today, *i.e.*, to mean 'the courts' statutory or constitutional *power* to adjudicate the case.'" *United States v. Cotton*, 535 U.S. 625, 630 (2002) (quoting *Steel Co.*, 523 U.S. at 89); *see also Steel Co.*, 523 U.S. at 90 ("'Jurisdiction,' it has been observed, 'is a word of many, too many, meanings.'") (quoting *United States v. Vanness*, 85 F.3d 661, 663 (D.C. Cir. 1996)).

framed the "issues of law" presented to it as being whether, in light of the provision in "28 U.S.C. § 2243" that "the writ of *habeas corpus* must be granted 'unless it appears from the application' that the applicants are not entitled to it," the petitioners were entitled to the writ as "a matter of right." *Id.* at 767, 779. After giving the *Eisentrager* petition "the same preliminary hearing as to sufficiency of application that was extended" in prior habeas war crimes cases involving prisoners incarcerated in the United States, and "[a]fter hearing all contentions [petitioners] have seen fit to advance and considering every contention we can base on their application and the holdings below," the Court "arrive[d] at the same conclusion the Court reached in each of those cases, viz.: that no right to the writ of *habeas corpus* appears." *Id.* at 781.

That the Court in *Eisentrager* based its decision upon petitioners' failure to show an entitlement to the writ under 28 U.S.C. § 2243, rather than upon the district court's lack of power or authority to entertain their petitions under 28 U.S.C. § 2241, shows that the court below was plainly wrong in holding that petitioners' claims in this case were not cognizable in federal court, even if they are different from the claims of the *Eisentrager* petitioners and even if they were presented outside the context of habeas corpus. So long as subject matter jurisdiction exists—as it plainly does in the present case, whether under 28 U.S.C. § 2241 or under 28 U.S.C. § 1331—the federal courts have the power and authority to consider petitioners' claims on their merits.

2. In *Eisentrager*, This Court Did Consider the Merits of Petitioners' Claims

Further evidence from *Eisentrager* that the district court has the power and authority to consider petitioners' claims comes from Part IV of that opinion. 339 U.S. at 785-90. Contrary to the court of appeals ruling that, under *Eisentrager*, "the courts are not open" to aliens in U.S. military custody outside the technical sovereignty of the United States, Pet. App. 2, the Court in *Eisentrager* was careful to note that "the doors of our courts have not been summarily closed upon these prisoners," 339 U.S. at 780.

It proceeded to devote six pages of its opinion to a thorough consideration of the merits of their claims. *See* 339 U.S. at 785-90.

First, the *Eisentrager* Court addressed, though it ultimately rejected, the petitioners' claim that the military commission which tried, convicted, and sentenced them, acted *ultra vires* because they were not charged with an offense against the laws of war, and because they were detained in an area (China) in which there were no ongoing hostilities and no American military occupation. 339 U.S. at 785-89. Second, the Court addressed, though again it ultimately rejected, the *Eisentrager* petitioners' claims that the United States had failed to give Germany notice of their trial, as specified in Article 60 of the Geneva Convention of July 27, 1929, and that they were entitled to be tried by the same courts and according to the same procedure as American soldiers, as specified in Article 63 of the Geneva Convention. *Id.* at 789-90.

Faced with this Court's extensive analysis of the merits of the *Eisentrager* petitioners' claims, which undercut a purely jurisdictional approach to the case, the court of appeals in this case was compelled to characterize Part IV of the *Eisentrager* opinion as "extraneous." Pet. App. 15. In support of this characterization, the court of appeals relied upon the *dissenting* opinion in *Eisentrager*, which similarly characterized Part IV as "gratuitous," "wholly irrelevant," and lending "no support whatever" to the Court's perceived holding. *Id.* (quoting 339 U.S. at 792, 794 (Black, J., dissenting)). Moreover, the court of appeals said there was a "ready explanation" for Part IV, namely, that prior to this Court's decision in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998), this Court and other federal courts simply "were not always punctilious in treating jurisdiction as an antecedent question to the merits." Pet. App. 16.

Both the court of appeals and the dissent in *Eisentrager* took this mistaken view of Part IV of the majority opinion because they assumed, erroneously, that the Court's holdings in Parts I-III were *jurisdictional* in the sense that the Court believed the district court lacked the

power and authority to consider the petitioners' claim. As we have already demonstrated, however, the Court in *Eisentrager*—which presumably read the dissenting opinion before deciding to retain Part IV in the opinion—did *not* hold that the district court lacked the power and authority to consider the petitioners' claim. Rather, the Court held that the petitioners failed to show their entitlement to the issuance of the writ of habeas corpus as "a matter of right." 339 U.S. at 779.

The Court's discussion of the lack of merit of the *Eisentrager* petitioners' claim was a necessary reinforcement of its conclusion that petitioners failed to show their entitlement to the writ. Far from indicating that courts lack power or authority to consider claims such as those of petitioners in this case, the discussion supports petitioners' contention that the courts have the power and authority to consider such claims.

C. Guantanamo, "For All Practical Purposes, Is American Territory"

Unlike in *Eisentrager*, petitioners here are being held in the exclusive custody of U.S. officials in an area wholly under U.S. jurisdiction and control.

As the United States Navy declares on its internet site, Guantanamo "for all practical purposes, is American territory."[56] Although Cuba retains "ultimate" sovereignty, it has no current sovereignty over Guantanamo. Its laws do not apply and its courts have no jurisdiction. As the Navy web site states, "the United States has for approximately [100] years exercised the essential elements of sovereignty over this territory, without actually owning it."[57] The web site explains that Cuba's "ultimate" sovereignty means "final or eventual" sovereignty: "Cuban

[56] U.S. Navy Website, *supra* note 9. The Navy bills the statements on its site as "unofficial" but posts them for the information of the world, presumably on the assumption that they are accurate and meaningful.

[57] *Id.*

sovereignty is interrupted during the period of our occupancy, since we exercise complete jurisdiction and control, but in case occupation were terminated, the area would revert to the ultimate sovereignty of Cuba."[58] The United States, in other words, currently exercises complete sovereignty over Guantanamo.[59] The government has never disputed that fact.

U.S. courts are understandably reluctant to exercise jurisdiction over activities in foreign territories subject to foreign laws and the jurisdiction of foreign courts.[60] But that is not the case in Guantanamo. There is no possibility of a conflict with foreign laws because only U.S. laws apply, and the United States alone—by the express terms of the lease—has jurisdiction there. A Cuban national wandering onto Guantanamo and committing a crime is subject to the exclusive jurisdiction of U.S. authorities and of the U.S. courts.[61] Even animals there are protected by

[58] *Id.*; *see also* Joseph Lazar, *International Legal Status of Guantanamo Bay*, 62 AM. J. INT'L L. 730, 735, 740 (1968).

[59] U.S. Navy Website, *supra* note 9; *see also* Rear Admiral Robert D. Powers Jr., *Caribbean Leased Bases Jurisdiction*, XV JAG J., No. 8, 163 (Oct.—Nov. 1961). ("If merely ultimate sovereignty is recognized by both parties as remaining in Cuba, then the exercise of present or actual sovereignty must be vested in the United States.")

[60] Avoiding possible conflict with the laws of another country was one of the concerns behind this Court's decision in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), in which the Court refused to invalidate the results of a search conducted by U.S. officials in Mexico undertaken with the authorization of the Mexican authorities. Similarly, U.S. courts may decline to exercise jurisdiction in order to avoid conflicts with foreign law pursuant to principles of international comity, that is "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for Southern Dist. of Iowa*, 482 U.S. 522, 544 n.27 (1987).

[61] *See United States v. Lee*, 906 F.2d 117 (4th Cir. 1990). Guantanamo is different in that regard from most U.S. military bases. For example, the leases for the U.S. military bases in Antigua, Bermuda, British Guiana, Jamaica, New Foundland, Saint Lucia and Trinidad are for definite and

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U.S. laws and regulations; and anyone, including any federal official, who violates those laws is subject to U.S. civil and criminal penalties.[62]

Indeed, the government chose Guantanamo as its prison site largely because its control there is exclusive. The government considered locating its prison at a site in a foreign country, but rejected that option because, among other things, although the "[l]itigation risks in U.S. courts would be eliminated . . . the potential for litigation under local or international law could become a factor."[63] Under the lease with Cuba, there is no risk of any kind of foreign adjudication at Guantanamo. There are no other courts to

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limited periods, grant the United States power and authority only to the extent necessary to establish, operate and defend a base within the leased territory and give the United States at most primary and concurrent jurisdiction over foreign nationals committing crimes on the bases. *See* 55 Stat. 1560, 1572, 1590, Department of State publication No. 1726, Executive Agreement Series 235 (1941). The Guantanamo Lease has been most often compared with the U.S. lease for the Panama Canal Zone. *See* Sedgwick Green, *Applicability of American Laws to Overseas Areas Controlled by the United States*, 68 HARV. L. REV. 781, 792 (1955). Unlike the Guantanamo Lease, however, the Canal Zone Lease specifically provided that "the sovereignty of such territory being actually vested in the Republic of Panama. . . . " Convention for the Construction of a Ship Canal to Connect the Waters of the Atlantic Pacific Oceans (Hay-Bunau-Varilla Treaty), art. III, Nov. 18, 1903, U.S.-Panama, 33 Stat. 2234, T.S. 431. Moreover, the rights and authority originally granted to the United States in the Canal Zone were substantially reduced by a later treaty in 1936. *See Green* at 789 an n.58 (referring to the General Treaty of Friendship and Cooperation with Panama, March 2, 1936, 53 Stat. 1807, T.S. no. 945). Nevertheless, there has never been any question that U.S. courts have jurisdiction over claims brought by foreign nationals in the Canal Zone. *See Canal Zone v. Gonzalez*, 607 F.2d 120 (5th Cir. 1979) (alien afforded all process due under Constitution); *Government of Canal Zone v. Scott*, 502 F.2d 566 (5th Cir. 1974).

[62] *See* Endangered Species Act, 16 U.S.C. § 1538; 48 Fed. Reg. 28,460-28,464 (June 22, 1983) (providing that the Endangered Species Act applies on Guantanamo to protect, *inter alia*, Cuban iguanas).

[63] McCallum, *Why GTMO?, supra* note 7.

whom the detainees could turn and no other laws that could protect them.

According to the court of appeals, however, the U.S. courts are also "not open to them." The prisoners at Guantanamo are not entitled to the same protection as a Cuban iguana: federal officials are free to violate federal laws and regulations with respect to those prisoners, and the courts have no jurisdiction to inquire into the legality of the officials' behavior or the humanity of the prisoners' treatment.

The reason, according to the court of appeals, is that the Guantanamo lease does not give the United States technical sovereignty over Guantanamo. The court of appeals held, in effect, that the lease gives the executive branch total power to act in Guantanamo but the judiciary has no authority to review that action. Such a decision, disconnecting the territorial reach of judicial authority from the territorial reach of plenary executive power, encourages manipulation of the judicial process. It would allow executive officials to shield their conduct from judicial examination—not only in Guantanamo, but in the United States as well. That, in fact, is what has happened here. Just as the decision to select Guantanamo was made in the United States, so were the key decisions at issue in this case—the decisions to deny petitioners access to their families and to counsel and to any impartial tribunal to review the bases for their detentions. Allowing government officials acting within the United States to insulate their decisions from court review simply by holding their prisoners at a location which, "in legal theory, is just outside our gates," would deprive the judiciary of its essential role as a check against arbitrary executive action.[64]

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[64] *Shaughnessy*, 345 U.S. at 219 (Jackson, J., dissenting).

IV. DENYING JUDICIAL REVIEW IS CONTRARY TO THE LAW OF CIVILIZED NATIONS

The Court in *Eisentrager* emphasized throughout its opinion that its decision denying habeas relief to convicted enemy aliens overseas was fully consistent with international law.[65] The court of appeals decision in this case, denying petitioners access to any court to review their claims, clearly is not. It is contrary to the most fundamental principles of the rule of law and the law of nations.

For almost 100 years, the United States has been the international leader in efforts to promote adoption of the rule of law around the world. It has championed the rule of law in fighting wars against totalitarian regimes and in seeking to contain and roll back the adoption of totalitarian ideologies. It has publicly rebuked and condemned regimes that fail to adhere to the rule of law.[66] It has fought for the global recognition of the rule of law through advocacy of the adoption of the Geneva Conventions, the Universal Declaration of Human Rights,[67] the International Covenant on Civil and Political Rights ("ICCPR"),[68] and the American Declaration of the Rights and Duties of Man.[69] These international agreements and covenants seek to make universal the principle, first adopted in the

[65] *Eisentrager*, 339 U.S. at 787-91.

[66] *See. e.g.*, United States Department of State Human Rights Reports, Country Report on Iraq (2002), http://www.state.gov/g/drl/rls/hrrpt/2002/18277.htm; Country Report on Yemen (2002), http://www.state.gov/g/drl/rls/hrrpt/2002/18293.htm; Country Report on Iran (2002), http://www.state.gov/g/drl/rls/hrrpt/2002/18276.htm.

[67] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

[68] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 52, U.N. Doc A/6316 (1966) at Pet. App. 85.

[69] American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser. L/V/II82 doc. 6 rev. 1 at 17 (1992) at Pet. App. 87.

Magna Carta, that no person may be deprived of liberty without access to an impartial tribunal administered in accordance with law. As these authorities demonstrate, the proposition that a nation may round up aliens and imprison them outside the rule of law and without court review is anathema to the law of civilized nations and to the principles the United States has promoted around the world.

The Geneva Conventions, for example, specifically require that a "competent tribunal" review a detention whenever there is any doubt as to the detainee's status.[70] As the Commentary to Geneva Convention IV makes clear, "Every person in enemy hands must have some status under international law: . . . nobody in enemy hands can be outside the law."[71] The ICCPR similarly guarantees detainees the right to impartial review of their detentions:

> Everyone has a right to liberty and security of person. No one shall be subjected to arbitrary arrest and detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law. . . .
>
> . . . [E]veryone shall be entitled to a public hearing by a competent and impartial tribunal established by law.[72]

Other treaties and conventions likewise proscribe detention without access to an impartial tribunal.[73]

[70] Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 5, 75 U.N.T.S. 135, at Pet. App. 84.

[71] ICRC, Commentary: Geneva Convention (IV) Relative to the Protection of Civilian Person in Time of War, 51 (Geneva: 1958).

[72] *See* ICCPR, *supra* note 68, Art. 9(1) and 14(1).

[73] *See, e.g.*, Universal Declaration of Human Rights *supra* note 67, Art. 9(1) and 9(4) ("[I]t is essential . . . that human rights should be protected by the rule of law. . . . [N]o one shall be subjected to arbitrary arrest, detention or exile. . . . Everyone is entitled in full equality . . . to [a] hearing by an independent and impartial tribunal"); American

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It is also well established under international law that the right to an impartial tribunal cannot be evaded by imposing detention outside a nation's borders. That has been an established principle in English law, since at least the seventeenth century when Lord Chancellor Edward Hyde was impeached for attempting to prevent prisoners from gaining access to the courts by sending them to "remote islands . . . thereby to prevent them from the benefit of the law."[74] It is also the universal consensus of the international community, as construed by the European Court of Human Rights,[75] the Inter-American Commission on Human Rights,[76] and the United Nations Human Rights Committee.[77] As the European Court of

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Declaration of the Rights and Duties of Man, art. XXV, *supra* note 69 ("Every individual who has been deprived of his liberty has the right to have the legality of this detention ascertained without delay by a court"); the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment ¶ 11.1, G.A. Res. 43/173, annex 43 U.N. GAOR, Supp. No. 49 at 298, U.N. Doc A/43/49 (1988), at Pet. App. 89 ("[A] person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority.").

[74] Proceedings in Parliament against Edward Earl of Clarendon, Lord High Chancellor of English, for High Treason, and other High Crimes and Misdemeanors, 15 and 19 Charles II A.D. 1663-1667 (1668), 6 State Trials 291 at 330, 396. *See generally* Brief of American and British Legal Historians as *Amici Curiae* and Brief for the Commonwealth Lawyers Association as *Amicus Curiae*.

[75] *See, e.g., Ocalan v. Government of Turkey,* Eur. Ct. H.R. App. No. 46221/99 (Mar. 2003) (concluding that a leader of the Kurdish resistance held in Kenya "was under effective Turkish authority and therefore was brought within the 'jurisdiction' of that state for purposes of" the European Convention of Human Rights); *Loizidou v. Turkey,* 23 Eur. H.R. Rep. 513 (1997) (a "state cannot insulate itself from Convention scrutiny by operating beyond state frontiers.").

[76] *Coard v. United States*, Case 10.951, Inter-Am. C.H.R. 1283, OEA/ser. L./V./II.106 doc 3 rev. (1999).

[77] *See Sergio Euben Lopez Burgos v. Uruguay*, Communication No. R.12/52 (June 6, 1979), U.N. Doc. Supp. No. 40 (A/36/40) at 176 (1981) (construing the ICCPR and holding that, where an arrest by Uruguay and mistreatment took place outside its borders, Uruguay was responsible for

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Human Rights has declared, "states are bound to secure the said rights and freedoms of all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad."[78]

As these sources attest, it would place the United States outside the established norms of international law should this Court accede to the executive's contention that detaining petitioners outside the territorial sovereignty of the United States insulates the detention from judicial review and deprives the petitioners of all legal recourse.[79] It would also send a dangerous signal to those around the world committed, as the United States has been, to upholding the rule of law, and an even more dangerous signal to those countries whose commitment to the rule of law has been tenuous at best. As one commentator has observed, "When life or liberty is at stake, the landmark judgments of the Supreme Court of the United States, giving fresh meaning to the principles of the Bill of Rights, are studied with as much attention in New Delhi or Strasbourg as they are in Washington, D.C. or the State of Washington, or Springfield, Illinois."[80]

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such actions, stating "it would be unconscionable to so interpret the responsibility under the . . . Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory").

[78] *Cyprus v. Turkey,* 4 Eur. H.R. 482 (1982). The Inter-American Commission on Human Rights has similarly declared: "[E]ach American state is obliged to uphold the protected rights of any person subject to its jurisdiction. . . . [T]he inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control." *Coard*, Case 10.951 at 37.

[79] *See* Barak, 116 HARV. L. REV. at 153 ("Even if the terrorist activities occur outside Israel or the terrorists are being detained outside Israel, we recognize our authority to hear the issue.").

[80] Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 541 (1988); *see also* Claire L'Heureux-Dube, *The*

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V. JUDICIAL REVIEW NEITHER THREATENS NATIONAL SECURITY NOR OPENS THE FLOODGATES TO LITIGATION

The government argues that the judiciary must stand aside and condone the establishment of a prison outside the rule of law, an institution without precedent in American history. But judicial review under our constitutional structure serves as an indispensable check on the power of the executive, particularly in times of crisis, ensuring that our fundamental values will not needlessly be disregarded through the unrestrained zeal of executive officials focused on doing whatever they think is effective to deal with the dangers of the moment.

A. Judicial Review Does Not Threaten National Security

The government appears to believe that federal court review would threaten our national security. To be sure, "no governmental interest is more compelling than the security of the Nation."[81] Because the war power is constitutionally committed to the political branches of government, Congress and the President enjoy a "wide scope for the exercise of judgment and discretion," and the judiciary owes the political branches substantial deference in reviewing the exercise of war power.[82]

The broad discretion bestowed by the Constitution upon Congress and the President in protecting national security, however, is not unlimited, and constitutional and other limitations on governmental action continue to

Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court, 34 TULSA L.J. 15 (1998).

[81] *Haig v. Agee*, 453 U.S. 280, 307 (1981).

[82] *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943); *see also Loving v. United States*, 517 U.S. 748, 768 (1996) ("[I]t would be contrary to the respect owed the President as Commander in Chief to hold that he may not be given wide discretion and authority.").

operate in wartime.[83] As this Court long ago declared: "[E]ven the war power does not remove constitutional limitations safeguarding essential liberties."[84] Individual liberties remain fully protected in wartime because "[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile."[85] Accordingly, the war power, like all other constitutional powers, cannot be exercised in derogation of other constitutional provisions, and "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of . . . power which can be brought within its ambit."[86]

Most crucially, here, the wide discretion enjoyed by the executive in protecting national security *does not deprive the courts of jurisdiction* over cases questioning the extent of that discretion. Although the military enjoys broad discretion when it acts within its sphere of authority, that discretion does not deprive the courts of power to

[83] *See United States v. Cohen Grocery Co.*, 255 U.S. 81, 88 (1921) ("[T]he mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guarantees and limitations of the Fifth and Sixth Amendments. . . ."); *Korematsu*, 323 U.S. at 233-34 (1944) (Murphy, J., dissenting) ("[I]t is essential that there be definite limits to military discretion . . . Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support."); *Bollman*, 24 F. Cas. at 1192 (Cranch, C.J., dissenting).

[84] *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934); *see also Ex parte Milligan*, 71 U.S. 2, 121 (1866) ("No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of [the Constitution's] provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism.").

[85] *United States v. Robel*, 389 U.S. 258, 264 (1967).

[86] *Id.* at 263. Rejection of unrestrained military authority is deeply embedded in the American legal tradition. Indeed, one of the chief complaints laid out in the Declaration of Independence was that King George had attempted to render the "military independent of and superior to the civil power."

review such actions, because the questions of "[w]hat are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."[87]

In accordance with these traditions, this Court has not hesitated to review executive actions alleged to be contrary to law, notwithstanding invocations of the war power and concerns over national security. The Court has thus held that the war power does not encompass unlimited and unreviewable authority to punish desertion by soldiers on the field of battle;[88] to maintain military production during wartime;[89] to punish acts of sabotage by alien enemies;[90] to seize enemy property;[91] to annex territory seized by military conquest;[92] to impose internments on resident aliens and U.S. citizens;[93] and to impose punishment on military dependents abroad.[94] In upholding judicial jurisdiction to review the merits of those actions, this Court has never accepted the proposition that the courts should be off-limits to challenges to executive action undertaken to protect national security. The current war on terrorism is no different.

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[87] *Sterling v. Constantin*, 287 U.S. 378, 401 (1932). Thus, this Court has long held that "the military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend to the Republic who advocates the contrary. The established principle of every free people is, that the law shall alone govern; and to it the military must always yield." *Duncan v. Kahanamoku*, 327 U.S. 304, 322-23 (1946) (quoting *Dow v. Johnson*, 100 U.S. 158, 169 (1879)); *see also Korematsu*, 323 U.S. at 234 (Murphy, J., dissenting) ("[T]he military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled.").

[88] *Trop v. Dulles*, 356 U.S. 86 (1958).

[89] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

[90] *Ex parte Quirin*, 317 U.S. 1 (1942).

[91] *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814).

[92] *Fleming v. Page*, 50 U.S. (9 How.) 603 (1850).

[93] *Korematsu v. United States*, 323 U.S. 214 (1944).

[94] *Reid v. Covert*, 354 U.S. 1 (1957).

No one disputes that the government must do all that is necessary to protect our nation from terrorism. But the threat of terrorism should not be allowed to compromise our fundamental principles of justice, fairness, and government accountability to the rule of law unless this is necessary. Executive officials "should not be the sole judges" of when those principles must be compromised.[95] The executive's focus is not on protecting personal liberty or preserving our time-honored safeguards against governmental excesses, but on protecting the nation's security and doing everything possible to increase public safety. In focusing on those objectives, the government can be expected to push its powers to the limit, and beyond. Someone impartial must have authority to examine the executive's actions. That is the traditional and essential role of the judiciary.

The experience of other nations facing ongoing threats of terrorism demonstrates that executive action aimed at protecting the nation's safety can be subject to judicial examination consistently with national security. Perhaps more than any other nation, the State of Israel has faced terrorism, both within and outside its territorial sovereignty, but it has never closed its courts to challenges to the legality of national-security measures alleged to infringe fundamental rights. Although the Israel High Court of Justice has ruled that "the court will not take any stance on the manner of conducting the combat,"[96] the court has ruled on various petitions challenging administrative detention of suspected terrorists.[97]

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[95] *United States v. U.S. Dist. Ct. for Eastern Dist. of Mich.*, 407 U.S. at 317.

[96] *Barakeh v. Minister of Defense*, HC 3114/02, 56(3) P.D. 11, 16 (Israel High Ct. of Justice 2002).

[97] *See, e.g., Anonymous v. Minister of Defense*, Cr. A 7048197, 54(1) P.D. 721 (Israel High Ct. of Justice 1997) (challenging administrative detention of suspected terrorists and the conditions of their confinement); *Pub. Comm. Against Torture v. Gov't of Israel*, H.C. 5100/94,

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Last fall, the court struck down an order issued in the midst of a terrorist crisis that allowed suspected terrorists to be detained for up to 30 days without access to an impartial judicial official.[98] As the court emphasized:

> The general rule is one of freedom. Confinement is an exception. . . . There is no authority to detain arbitrarily. . . .
>
> Judicial intervention with regard to detention orders is essential. . . . Judicial review is the line of defense for liberty, and must be preserved beyond all else.
>
> Judicial intervention stands before arbitrariness; it is essential to the principle of rule of law. . . . It guarantees the preservation of the delicate balance between individual liberty and public safety.[99]

The court recognized that "there is room to postpone the beginning of the investigation, and naturally also the judicial intervention until after detainees are taken out of the battlefield to a place where the initial investigation and judicial intervention can be carried out properly."[100] Once that happened, however, access to a judicial official cannot be delayed. The court held that allowing detention for 30 days without access to judicial authority "unlawfully infringes upon the judge's authority, thus infringing upon the detainee's liberty, which the international and Israeli legal frameworks are intended to protect."[101]

The war on terrorism, like all other governmental actions, can be conducted only within the bounds of law.

53(4) P.D. 817, 845 (Israel High Ct. of Justice 1994) (challenging the means by which suspected terrorists may be interrogated).

[98] *Marab v. IDF Commander in the West Bank*, HC 3239/02, slip op. (Israel High Ct. of Justice 2003).

[99] *Id.* at 10, 14.

[100] *Id.* at 18.

[101] *Id.* at 21.

The President of the Israel high court emphasized that judges must not shrink from applying the law in the face of terrorism: "[T]he struggle against terrorism is not conducted outside the law, but within the law, using tools that the law makes available to a democratic state. Terrorism does not justify the neglect of accepted legal norms. This is how we distinguish ourselves from the terrorists themselves."[102] Our country, no less than Israel, is committed to the rule of law. Terrorism must not be allowed to destroy that commitment.

B. Allowing Judicial Review Will Not Open the Floodgates to Litigation

Petitioners ask only that the courts ensure that an adequate process be put in place so that their detentions are not arbitrary. They do not contend that an Article III court must itself conduct that process and review the basis for each individual detention. Rather, they contend that some legal process must apply and that the courts must have the authority to ensure that one does. Because petitioners seek a judicial forum to ensure that the government establishes a fair process, rather than to review the validity of particular detentions, acceptance of jurisdiction will not open the floodgates of litigation.[103]

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[102] Barak, 116 HARV. L. REV. at 151. As with Israel, English treatment of suspected terrorists has been subjected to judicial review. *See, e.g., Republic of Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25 (1978) (reviewing the means of interrogation of suspected Irish Republican Army terrorists).

[103] Petitioners' claims are akin to those at issue in *Bowen*, in which private parties sought to challenge the method by which certain Medicare claims were determined rather than to challenge particular claims determinations. This Court concluded that "permitting review only [of] . . . a particular statutory or administrative standard . . . would not result in a costly flood of litigation, because the validity of a standard can be readily established, at times even in a single case." *Bowen*, 476 U.S. at 680 n.11 (alterations by the Court) (quoting Note, 97 HARV. L. REV. 778, 792 (1984)). Petitioners here challenge the failure of the government to institute a process to determine the legality of their

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In fact, the government's existing regulations, incorporating the requirements of the Geneva Conventions, establish such a process; they require that an impartial panel review the claim of any detainee who asserts an entitlement to treatment as a prisoner of war or as to whom there is any doubt as to his or her status.[104] That process has been applied in each of our recent conflicts, from Vietnam to the current conflict in Iraq. Indeed, in the prior Gulf War, the government held 1,196 individual hearings to assess the status of captured persons. In 886 of those hearings, the individuals detained were found not to be combatants at all, but displaced civilians or refugees. Only 310 were found to be enemy combatants, and all of those were determined to be "privileged" or legal combatants.[105]

At Guantanamo, the government has conducted no individual hearings. It has simply disregarded its regulations. Yet, because the Guantanamo detainees were all taken into custody dressed as civilians, and because many were turned over by bounty hunters, the danger of mistake is at least as great as in the prior Gulf War—as is the need for a process to distinguish and prevent the prolonged and unjustified detention of the innocent. Detaining people without such a process can be justified only for so long as it takes to put a process in place. The executive may conduct that process, as its regulations require, but the judiciary must stand watch. Barring it from doing so authorizes the executive to engage in just the sort of

detentions. The validity of a process could be determined in a single case and would not lead to a flood of litigation.

[104] *See Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, U.S. Army Regulation 190-8, Chapter 1-5, para. A (Oct. 1, 1997).

[105] Department of Defense, *Report on the Conduct of the Persian Gulf War, Final Report to Congress* (April 1992), *cited in* DAVID COLE, ENEMY ALIENS at 42 n.69 (New Press 2003).

unrestrained and arbitrary conduct that the framers of our Constitution were intent upon preventing.[106]

The government recently announced that it plans to release over a hundred Guantanamo prisoners, and allow one to see a lawyer.[107] Although the Guantanamo prison has been operating since January 2002, those announcements were not made until shortly after this Court granted certiorari to consider whether it had jurisdiction. It is doubtful they would have been made otherwise. Nothing more clearly demonstrates the need for judicial review than that the threat of it has caused the executive to act. Our framers were correct that absolute power is what is most to be feared; as soon as there is any restraint, or in this case the threat of restraint, its exercise becomes more reasonable.

Judicial review is explicitly authorized by statute; and it is necessary, as our founders believed, to ensure that our fundamental values are not needlessly disregarded through the exercise of unfettered executive authority.

[106] That the bar on jurisdiction might be self-imposed by the judiciary itself "does not make it innocuous. . . . Abdication of responsibility is not part of the constitutional design." *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring).

[107] *U.S. to Release 140 from Guantanomo; No Timeframe Given for Letting Detainees Go*, WASH. POST, Dec. 1, 2003, at A07; Vanessa Blum, *Tactics Shift in War on Terrorism*, THE LEGAL INTELLIGENCER, Dec. 10, 2003, at 4.

CONCLUSION

The judgment below should be reversed and the case remanded for the appropriate exercise of judicial jurisdiction.

Respectfully submitted,

THOMAS B. WILNER
Counsel of Record
NEIL H. KOSLOWE
KRISTINE A. HUSKEY
JARED A. GOLDSTEIN
HEATHER LAMBERG KAFELE

SHEARMAN & STERLING LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: 202-508-8000
Facsimile: 202-508-8100
Attorneys for Petitioners

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